FILED
FEB 4 1977
MICHAEL RODAK, JR., CLERK

No. 76-709

In the Supreme Court of the United States

OCTOBER TERM, 1976

EARL L. BUTZ, ET AL., PETITIONERS

v.

ARTHUR N. ECONOMOU, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Respondents oppose the petition "because the facts adduced thus far are insufficient to permit this Court to determine the scope of immunity," which, respondents urge, "must be determined after full discovery, and perhaps at trial, but cannot be determined at this preliminary stage of proceedings" (Br. in Opp. 5).

At the time of petitioners' motion to dismiss, however, the district court had before it an affidavit explaining the roles petitioners played in the administrative proceedings upon which this suit is based (C.A. App. 10a-19a).[1]

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[1]Contrary to respondents' contention (Br. in Opp. 7), this affidavit was not made irrelevant because it was submitted earlier in the litigation, before the complaint was amended. The affidavit details petitioners' involvement in the administrative proceedings regarding the respondents. Although the complaint was amended, the facts regarding the roles of petitioners in those proceedings did not change.

Based on the record before it, the district court found (Pet. App. B, p. 28a) that "[petitioners] have shown that their * * * acts were both within the scope of their authority and discretionary * * *." That finding, which the court of appeals did not disturb (see Pet. App. A, pp. 1a-22a), is sufficient under *Barr* v. *Matteo*, 360 U.S. 564, to warrant absolute immunity.[2] Accordingly, there is a sufficient factual record available now to enable this Court to determine the question presented in the petition, *i.e.*, whether federal government officials have an absolute rather than a qualified immunity from suit for damages based upon their performance of official duties in connection with administrative enforcement proceedings.[3]

Respondents' argument that the scope of immunity can be resolved only "after full discovery, and perhaps at trial" is incorrect in the context of a claim of absolute immunity. See *Howard* v. *Lyons*, 360 U.S. 593 (resolving an immunity question in a case essentially in the same litigation posture as the case here). Absolute immunity is designed not only to protect government officials from

[2]Respondents point out (Br. in Opp. 8) that only three other Justices joined in Mr. Justice Harlan's opinion in *Barr*, but that is not a fair measure of the authority of the legal principles which that opinion sets forth and upon which petitioners rely here. In his dissent in *Barr* (360 U.S. at 592), Mr. Justice Stewart stated that the plurality opinion "contains * * * a lucid and persuasive analysis of the principles that should guide decision in this troublesome area of law." Mr. Justice Stewart's only disagreement with the plurality concerned "the application of these principles to the facts of the present case" (*ibid.*). In the companion case to *Barr*, *Howard* v. *Lyons*, 360 U.S. 593, Mr. Justice Stewart joined the opinion of the Court, which granted absolute immunity on the basis of the plurality's legal analysis in *Barr* (see *id.* at 597).

[3]Indeed, the court of appeals indicated its agreement that the record was adequate for the application of *Barr* when it stated that it "might be inclined * * * to follow [*Barr*] in this case" "[h]ad [it] represented the last word in this evolving area * * *" (Pet. App. A, p. 8a).

the possibility of liability, but also to avoid the necessity of a trial. See *Barr* v. *Matteo*, 360 U.S. 564, 571. As this Court noted in *Imbler* v. *Pachtman*, 424 U.S. 409, 419 n. 13, absolute immunity "defeats a suit at the outset," whereas "[t]he fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial." The question presented here is whether petitioners are entitled to absolute immunity. Since the case is now in an appropriate posture for review of that question, allowing the litigation to proceed further without a final resolution of petitioners' claim would be to deny unnecessarily an element of the protection that petitioners seek.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

FEBRUARY 1977.

DOJ-1977-02